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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NATHAN L. TOPOL, et al., Plaintiffs and Respondents, v. MERLE D. COHN, et al., Defendants and Appellants.	A104800 (Napa County Super. Ct. No. 26-18018)

Appellants have filed the instant appeal from a judgment entered in favor of their neighbors in a quiet title action regarding a disputed acre of land located between their adjacent properties. Appellants claim: (1) the trial court's statement of decision does not comply with requirements of Code of Civil Procedure sections 632 and 634;[1] (2) the evidence does not support a finding of continuing trespass; (3) the court erred in refusing to grant them a prescriptive easement due to the property's agricultural setting; and (4) the court should have found respondent's property claims time-barred under section 318. We conclude none of these arguments has merit and affirm the judgment.

BACKGROUND

Because the relevant facts are undisputed, we rely on the recitation of facts in the trial court's statement of decision. (See, e.g., *Granowitz v. Redlands Unified School Dist.* (2003) 105 Cal.App.4th 349, 352.)

[1] All statutory references are to the Code of Civil Procedure unless otherwise noted.

Appellants (Stuart Sloan, the Sloan Family Winery and trustee Merle Cohn) and respondents (Nathan and Virginia Topol) both purchased their adjacent properties in Rutherford, California in 1997. The Topol property consisted of 40 acres of unimproved, heavily brushed terrain. After their purchase, respondents built a single-family residence on the Topol property. The Sloan parcel is also 40 acres in size and contains a house, winery facility, landscaping and other improvements. When appellants bought the Sloan property, it had a preexisting deer fence that did not follow property lines and cut across the northwest corner of the Topol property.

In March 1997, before purchasing the Sloan property, appellants obtained a survey that advised them a portion of their "garden" area near the deer fence encroached on the neighboring parcel of land. In addition, the survey noted that the neighbor's roadway encroached upon a corner of Sloan's land. After respondents purchased the Topol property, appellants told them about these encroachments and suggested a property exchange that would have given each ownership of the encroaching areas. The parties later discussed some proposals, but no agreement was ever reached. Respondents eventually built a new access road entirely on their own property. In March 1998, appellants removed the old deer fence but installed a new fence that encroached upon approximately one acre in the northwest corner of the Topol parcel. This northwest corner—on the Sloan side of the deer fence—is the area of property now in dispute.

After notifying appellants' attorney, respondents removed a section of the encroaching area of fence and installed a new fence along the property line. Appellants removed this new fence and declared that any future entry by respondents into the disputed area would be considered a forcible detainer. Respondents thereupon filed an action to quiet title in the disputed area. They also sought an injunction preventing future interference with the boundary line and damages for trespass. Appellants filed a cross-complaint seeking to quiet title to the disputed area, on the theory that they obtained a prescriptive easement, and seeking declaratory relief and damages for forcible detainer, trespass and other claims. After a bench trial, during which the court heard witnesses, received documentary evidence and made a site visit, the court ruled in favor of

respondents on each of their claims and dismissed the cross-complaint. The court declared respondents to be the true owners in fee of the disputed area, ordered appellants to remove all encroachments, and enjoined appellants from asserting any claim on the area or interfering with the boundary line. The court further awarded respondents $15,063 in damages for trespass and $3,649.57 for costs of suit.

DISCUSSION

I. Statement of Decision Is Adequate

Appellants first assert the judgment must be reversed because the trial court's 24-page statement of decision is inadequate in that it does not resolve all controverted issues. They present no new argument on this point, however, but merely refer this court to objections they raised to the statement of decision below. Absent pertinent argument, we may treat this issue as waived. (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 559 [incorporation by reference is not a substitute for appellate argument]; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1090.)

In any event, it is apparent the trial court's detailed statement of decision more than satisfies the requirements of sections 632 and 634.[2] "In rendering a statement of decision under Code of Civil Procedure section 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result. [Citations.] . . . A failure to find on an immaterial issue is not error. [Citations.] The trial court need not discuss each question listed in a party's request; all that is required is an explanation of the factual and legal basis for the court's decision regarding the principal controverted issues at trial as are listed in the request. [Citation.]"

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[2] Section 632 requires the court to issue a statement of decision after a court trial "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial" upon the timely request of a party. If the statement fails to resolve a controverted issue that was brought to the court's attention, the prevailing party is not entitled to an inference on appeal that the issue was decided in its favor. (§ 634.)

(*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.) The statement of decision here separately addresses each of the causes of action alleged in the complaint and cross-complaint. Appellants suggest the decision did not resolve controverted issues they raised regarding whether respondents' claims were barred by the statutes of limitation for trespass (§ 338, subd. (b)) and recovery of property (§ 318), and whether appellants were entitled to a prescriptive easement. Yet the statement of decision careful analyzes, and resolves, each of these questions. "Since the statement of decision adequately disposes of all the basic issues in the case, it is sufficient. [Citation.]" (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 763, footnote omitted.)

II. Trespass Was Continuing, Not Permanent

In an abbreviated and somewhat confusing argument, appellants assert the trial court was required to find their trespass on the disputed area was permanent, as opposed to continuous, because respondents did not introduce evidence about the cost of abating the trespass (which appellants claim was required under *Mangini v. Aerojet-General Corp*. (1996) 12 Cal.4th 1087.) The significance of this classification is that the statute of limitations on a claim of permanent trespass is three years and commences upon the initial date of encroachment. (§ 338, subd. (b); *Carbine v. Meyer* (1954) 126 Cal.App.2d 386, 390.) Appellants argued below that if they committed a trespass by constructing a deer fence in 1998, this was a permanent trespass that triggered the three-year statute of limitations.

The trial court properly concluded appellant's trespass was continuing, not permanent. Where a nuisance or trespass "is of such character that it will presumably continue indefinitely it is considered permanent, and the limitations period runs from the time the nuisance is created. [Citations.] On the other hand, if the nuisance may be discontinued at any time it is considered continuing in character. [Citations.] Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred. [Citations.]" (*Phillips v. City of Pasadena* (1945) 27 Cal.2d 104, 107-108.) In *Phillips*, the Supreme Court held that a locked gate

placed across a road to the plaintiff's property was in the nature of a continuing nuisance or trespass because it appeared the gate could be removed at any time. (*Id.* at p. 108.) Here too, the deer fence appellants erected could be removed from the property, and in fact a portion of it was so removed. Likewise, the olive trees and other landscaping appellants planted on the disputed parcel are not permanent structures that would be very difficult to remove. (Contrast *Williams v. Southern Pacific R.R. Co.* (1907) 150 Cal. 624, 626-627 [steam railroad constructed on plaintiff's property was a permanent trespass]; *Castelletto v. Bendon* (1961) 193 Cal.App.2d 64, 66-67 [buildings constructed on concrete piers and a permanent foundation were permanent encroachments for purposes of the statute of limitations].)[3] Because the trespass was of a continuing, not permanent, nature, the trial court properly ruled respondent's claims were timely under section 338, subdivision (b).

Furthermore, unlike the toxic waste contamination scenario presented in *Mangini v. Aerojet-General Corp.*, *supra,* 12 Cal.4th 1087, determination of the nature of appellants' trespass could be made without resort to complex evidence addressing the practicality and cost of abating it. In *Mangini*, the defendant had dumped toxic waste products on the subject parcel of land for 10 years, and the question arose whether the landowners' claims for nuisance and trespass were time-barred. (*Id.* at pp. 1090-1092.) The jury was asked to determine whether the nuisance was permanent or continuing, and the Supreme Court held this question required the plaintiff to introduce evidence showing the nuisance was abatable, i.e., capable of removal without unreasonable expense. (*Id.* at pp. 1096-1103.) Because the plaintiffs in *Mangini* failed to show that the contamination could even be abated, as a practical matter, or how many millions of dollars such an

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[3] Appellants rely on *Wilson v. Handley* (2002) 97 Cal.App.4th 1301 to claim their olive trees are "permanent structures." *Wilson* concerned whether a row of tall evergreen trees planted along a property line could constitute a "spite fence" under Civil Code section 841.4. (*Wilson v. Handley*, *supra*, 97 Cal.App.4th at p. 1304.) The decision did not address the proper characterization of a trespass to land and is irrelevant to the issue before us.

abatement would cost, the court concluded there was no substantial evidence to support the jury's finding of a continuing nuisance. (*Id.* at pp. 1096, 1103.)

The facts of the present case are far simpler. The trial court could have inferred that the encroaching deer fence was capable of removal from the court's own visit to the site, and from evidence that appellant Sloan had previously removed the old deer fence before erecting the new one. The expense of removing the fence was also, as the trial court found, "simple to infer from the evidence presented." Respondent Topol testified his cost in erecting a new fence was $5,742, plus an additional $5,000 in labor. From this evidence, the court could properly infer that the deer fence and any encroaching landscaping could be removed by reasonable means and at a reasonable cost (see *Mangini v. Aerojet-General Corp.*, *supra,* 12 Cal.4th at p. 1103), and the judgment will not be reversed for respondents' failure to introduce additional evidence on this point.

III. Appellants Not Entitled to Prescriptive Easement

Appellants next argue the trial court erroneously "failed to recognize and address [the] prescriptive easement rights of property owners in agriculture/commercial settings." In finding that appellants were not entitled to an exclusive prescriptive easement in the disputed area, the court relied on *Raab v. Casper* (1975) 51 Cal.App.3d 866, *Silacci v. Abramson* (1996) 45 Cal.App.4th 558 and *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296. We view these cases, and the more recent case of *Harrison v. Welch* (2004) 116 Cal.App.4th 1084, as controlling and conclude appellants' claim must be rejected.

All four cases involved encroachments upon the residential property of a neighbor, and the decisions address whether the encroacher may, under any circumstances, gain the right to an exclusive, prescriptive easement to continue its use of the property. (See *Harrison v. Welch*, *supra,* 116 Cal.App.4th at pp. 1090-1094; *Mehdizadeh v. Mincer*, *supra,* 46 Cal.App.4th at pp. 1304-1308; *Silacci v. Abramson*, *supra,* 45 Cal.App.4th at pp. 562-564; *Raab v. Casper*, *supra,* 51 Cal.App.3d at pp. 876-877.) The cases explain that the claims of residential landowners for exclusive use of neighboring property upon which they have encroached are properly viewed as claims for adverse possession. "There is a difference between a prescriptive use of land culminating in an easement (i.e.,

an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the use of land, the other with possession; although the elements of each are similar, the requirements of proof are materially different. [Citations.]" (*Raab v. Casper, supra,* 51 Cal.App.3d at p. 876; see also *Mehdizadeh v. Mincer, supra,* 46 Cal.App.4th at p. 1305 ["Proof of the elements required for adverse possession . . . gives a successful claimant *title* to property. A successful claimant of a prescriptive easement, by contrast, gains not title but the right to make a specific *use* of someone else's property"].)

Where, as here, an encroacher's use of property excludes access by the title holder (e.g., by a fence) and divests the title holder of most rights owners customarily have in their residential property, the encroacher's "right to 'use' looks more like 'occupancy,' possession, and ownership. [Citations.]" (*Mehdizadeh v. Mincer, supra,* 46 Cal.App.4th at p. 1306.) Absent extraordinary circumstances or an exercise of its equitable powers (see, e.g., *Hirshfield v. Schwartz, supra,* 91 Cal.App.4th at pp. 764-771 [court created an equitable easement to protect encroacher's use of land]), the trial court may not grant an encroaching party what amounts to an ownership interest in property without a finding that the required elements of adverse possession have been satisfied. (*Harrison v. Welch, supra,* 116 Cal.App.4th at pp. 1093-1094; *Mehdizadeh v. Mincer, supra,* 46 Cal.App.4th at pp. 1306-1307; *Silacci v. Abramson, supra,* 45 Cal.App.4th at p. 562; *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1048; see also *Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1186-1187 [encroacher who occupied and fenced in property not entitled to prescriptive easement but had to prove adverse possession].)[4]

Appellants do not take issue with the rule established in these cases "that an exclusive prescriptive easement, 'which as a practical matter completely prohibits the true owner from using his land' (*Silacci v. Abramson, supra,* 45 Cal.App.4th at p. 564), will not be granted in a case (like this) involving a garden-variety residential boundary

[4] This case involves no claim, or evidence, that appellants satisfied the requirements for adverse possession.

encroachment." (*Harrison v. Welch, supra,* 116 Cal.App.4th at p. 1093, footnote omitted.) Instead, appellants suggest this case should be treated differently because the properties are large in size and one (theirs) is used for agricultural as well as residential purposes. Appellants cite no authority for their position, and we decline to make an exception to the law of prescriptive easements based on such arbitrary distinctions. Despite appellants' speculation about dire consequences for landowners who unknowingly plant vineyards on neighboring property, our application of well-settled property law to the facts of this case will not impair the rights of good faith improvers like appellants' hypothetical vintner. (See § 871.1 [defining "good faith improver" as a person who makes an improvement to land under a mistaken belief that he owns the land].) In light of appellant Sloan's admissions and the survey that disclosed the disputed area was not part of appellants' property, the trial court found appellants were not good faith improvers entitled to protection under section 871.1 et seq., and appellants have not challenged this ruling on appeal.

IV. Respondents' Property Claims Were Not Time-Barred

Finally, appellants argue respondents property claims were barred by the statute of limitations set forth in section 318.[5] As appellants recognize, however, this argument requires a prerequisite finding that appellants had a right to a prescriptive easement in the disputed area. It is settled that the limitations period of section 318 does not commence to run against a landowner until there has been " 'an avowed claim of ownership by the party relying upon the statute and substantially all the elements' " of adverse possession or a prescriptive easement have been shown to exist. (*Harrison v. Welch*, *supra*, 116 Cal.App.4th at p. 1096, italics omitted.) "Thus, unless and until the encroacher's use of the property ripens into title by adverse possession or a valid prescriptive easement, the legal title holder's right to bring an action to recover his or her property from the

[5] Section 318 provides: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."

encroacher *never* expires. This must be so, 'otherwise, the record owner would be unable to recover possession, and a possessor would be unable to establish title' or a prescriptive easement. [Citation.]" (*Ibid.*) Because the trial court correctly concluded appellants were not entitled to a prescriptive easement, respondent's claims to recover the disputed property were timely under section 318. (*Harrison v. Welch, supra*, 116 Cal.App.4th at pp. 1095-1096.)

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.